RECEIVED
MAY 14 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-6322

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL COPY

OCTOBER TERM, 1980

DOYLE EDWARD SKILLERN,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

CHARLES A. PALMER
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

NO. 80-6322

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DOYLE EDWARD SKILLERN,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari files this Brief in Opposition.

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES.	ii,iii
QUESTIONS PRESENTED	2
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES.	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT.	5
CONCLUSION.	15
CERTIFICATE OF SERVICE.	16

INDEX OF AUTHORITIES

Cases:	Page
Battie v. State, 551 S.W.2d 401 (Tex.Crim.App. 1977)	11
Cardinale v. Louisiana, 394 U.S. 437 (1969)	6
Crowell v. Randell, 10 Pet. 368 (1836)	6
Jurek v. Texas, 428 U.S. 262 (1976)	14
Lockett v. Ohio, 438 U.S. 586 (1978)	12,14
Nye & Nissen v. United States, 333 U.S. 613 (1949)	14
Owings v. Norwood's Lessee, 5 Cranch 344 (1809)	6
Pereira v. United States, 347 U.S. 1 (1954)	14
Tacon v. Arizona, 410 U.S. 351 (1973)	6
Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967)	7
United States v. Brown, 591 F.2d 307 (5th Cir.), cert. denied, 442 U.S. 913 (1979)	9
United States v. Davis, 604 F.2d 474 (7th Cir. 1979)	9
United States v. Poulack, 556 F.2d 83 (1st Cir.), cert. denied, 434 U.S. 986 (1977)	9
United States Ex rel. Mathis v. Rundle, 394 F.2d 748 (3rd Cir. 1968)	7
United States v. Sexton, 473 F.2d 512 (5th Cir. 1973)	9
United States v. Tortora, 464 F.2d 1202 (2nd Cir.), cert. denied, 409 U.S. 1063 (1972)	9
United States v. Vargas-Martinez, 569 F.2d 1102 (9th Cir. 1978)	9
United States v. White, 451 F.2d 1225 (6th Cir. 1971)	9

INDEX OF AUTHORITIES
Continued

Constitutional Provisions And Statutes:	Page
Eighth Amendment, United States Constitution. . . .	2
Fourteenth Amendment, United States Constitution. .	2
Sixth Amendment, United States Constitution	2
Tex. Code Crim. Pro. Ann. § 26.04	7
Tex. Code Crim. Pro Ann. § 37.071	2,10
Tex. Penal Code Ann. § 7.01	2,13
Tex. Penal Code Ann. § 7.02	2,13
28 U.S.C. § 1257(3)	2
Rule 702, Federal Rules of Evidence	11

QUESTIONS PRESENTED

I. Whether certain of Petitioner's claims are properly before this Court.

II. Whether Petitioner was denied the effective assistance of counsel because the trial court overruled his motions for continuance and for appointment of co-counsel.

III. Whether the admission of a pathologist's testimony at the punishment phase of the trial concerning Petitioner's propensity to commit criminal acts of violence that would constitute a continuing threat to society deprived the Petitioner of any constitutionally protected right.

IV. Whether Petitioner was deprived of any constitutionally protected right by admission at the punishment phase of an indictment alleging that he had committed the offense of murder with malice, when a judgment of conviction for the offense of murder without malice also was admitted.

V. Whether a sentence of death is disproportionately severe when applied to one convicted of capital murder pursuant to the law of parties.

OPINION BELOW

The decision of the Texas Court of Criminal Appeals affirming Petitioner's conviction is reported at 609 S.W.2d 762.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner's claims are based on the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Also involved herein are Sections 7.01 and 7.02 of the Texas Penal Code and Article 37.071 of the Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

Although in substantial agreement with Petitioner's statement of the case, Respondent wishes to correct the following misstatements and omissions:

(1) Petitioner correctly states that there was no evidence adduced to show he was in the car with his accomplice and the deceased at the time the murder was committed (Petition at 4). It is undisputed, however, that Petitioner was driving a car which was beside the deceased's car at the time of the shooting, and the State's theory of the case was that Petitioner thereby diverted the deceased's attention so that the trigger man could commit the murder.

(2) Petitioner incorrectly states that the trial court gave no reason for appointing different counsel than had represented Petitioner at the prior proceeding (Petition at 4). In denying Petitioner's motion for appointment of co-counsel, the court made the following statement:

> Well, Mr. Tinker is a great lawyer, but he is busy and engaged in Federal Court cases. I think it would be an imposition on him. This case is tried in Aransas County, and we would like to use Aransas County lawyers.
> 1/

(St.Tr. 29).

(3) Petitioner incorrectly states that counsel for his second trial was not given an opportunity to review the record of the prior trial until March 8, 1978 (Petition at 6). In fact, counsel testified that he was provided several volumes of the record of the first trial prior to his appointment on February 20, 1978 (St.Tr. 34-35).

(4) The record also reflects that counsel was able to receive advice via the telephone from Petitioner's counsel

---

1/ St.Tr. refers to the transcript of Petitioner's trial.

at the prior proceeding (St.Tr. 38).

(5) Petitioner correctly states that the court admitted an indictment alleging Petitioner had committed the offense of murder with malice (Petition at 7). Petitioner neglects to mention, however, that a judgment of conviction for the offense of murder without malice also was admitted.

SUMMARY OF ARGUMENT

This Court is without jurisdiction to consider Petitioner's claims concerning the pathologist's testimony, the admission of the indictment, and the constitutionality of a sentence of death applied to one convicted under the law of parties because these contentions were not presented to the Texas Court of Criminal Appeals on direct appeal of Petitioner's conviction.

Petitioner's claims are without merit. Several of the grounds upon which Petitioner's allegation of ineffective assistance of counsel is based were not presented to the trial court in support of Petitioner's motion for continuance; consequently, nothing was presented for review to the Texas Court of Criminal Appeals, and these claims are not properly before this Court. Neither the Court's denial of Petitioner's motion for continuance nor its denial of his motion for appointment of co-counsel caused Petitioner to be denied the effective assistance of counsel. Admission of both the pathologist's testimony concerning Petitioner's propensity for future violence and the indictment for murder with malice were proper; admission of the pathologist's testimony, if error, was harmless beyond a reasonable doubt in light of the other extremely damaging evidence introduced at Petitioner's trial. A sentence of death is neither disproportionately severe nor cruel and unusual when applied to one convicted of capital murder pursuant to the law of parties.

ARGUMENT

I.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER SEVERAL OF PETITIONER'S CLAIMS BECAUSE THEY WERE NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

Petitioner's claims regarding admission of the pathologist's testimony concerning future dangerousness, the indictment for murder with malice, and the constitutionality of a death sentence for one convicted of capital murder pursuant to the law of parties were not presented to the Texas Court of Criminal Appeals and therefore are not properly before this Court.

Petitioner urges that admission of the pathologist's testimony and the murder indictment undermined the fairness and reliability of the fact-finding process, thereby violating his rights under the Eighth and Fourteenth Amendments (Petition at ii, 16, 20). Petitioner also asserts that death is a disproportionately severe and unconstitutional sentence for one who has not taken life or attempted or intended to do so (Petition at ii, 23). These broad constitutional claims were not presented to the Texas Court of Criminal Appeals in Petitioner's direct appeal of his conviction, nor were they passed upon by that Court.

Attached to this Brief as Appendix A is a copy of Petitioner's appellate brief to the Texas court. In his fifteenth ground of error Petitioner complained that the trial court erred in admitting Dr. Rupp's testimony because he was not qualified as an expert witness and because his testimony invaded the province of the jury (Appendix A at 19). In his twentieth ground of error, Petitioner urged that admission of the indictment was improper under the Texas Code of Criminal Procedure and therefore error (Appendix A at 36). In his fourth ground of error, Petitioner assailed the constitutionality of the Texas death penalty statute on the ground that it allowed the jury unfettered discretion

(Appendix A at 6), and in his twenty-first and twenty-second grounds of error, Petitioner complained that the court had erred in submitting the statutory special issues to the jury following the punishment phase because there was no evidence to support them (Appendix A at 37-38).

The cases are legion that this Court cannot decide issues raised for the first time on petition for writ of certiorari or upon appeal and that the Court will not decide federal questions not raised and decided in the Court below. E.g., Tacon v. Arizona, 410 U.S. 351, 352 (1973); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, at 439. Respondent submits that in view of Petitioner's failure to raise the federal issues presented here below, the failure of the state court to pass on those issues, the desirability of giving the state the first opportunity to address those issues, and the fact that a federal habeas remedy remains if no state procedure for raising those issues is available to Petitioner, the application for certiorari as to those issues should be denied for want of jurisdiction. Cardinale v. Louisiana, at 439.

II.

THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTIONS FOR CONTINUANCE AND FOR APPOINTMENT OF CO-COUNSEL DID NOT CAUSE PETITIONER TO BE DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Counsel was afforded ample time to prepare for trial, and Petitioner was not prejudiced by the court's denial of his motion for continuance.

Petitioner urges that this Court should grant the writ to decide whether the late appointment of counsel is so inherently prejudicial as to make out a prima facie showing of ineffective assistance (Petition at 10-11). Respondent submits that such a rule can have no application to the circumstances herein, and that the instant case is therefore manifestly unsuitable for determination of this question. That this is so may be discerned from the very decisions upon which Petitioner relies, Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967) and United States Ex Rel. Mathis v. Rundle, 394 F.2d 748 (3rd Cir. 1968). In Twiford, the Court of Appeals found demonstrable prejudice where counsel was appointed the day before trial and thus was unable to secure the presence of a material witness:

> In the case at bar, beyond proof of the facts showing inherent prejudice, appellant testified, without contradiction by the Commonwealth, that Frances Randall may have provided an alibi for one charge and a basis for attacking the credibility of a chief prosecution witness on both charges.

Id. at 673 (emphasis added). It is also important to note that in Twiford, counsel moved for a continuance specifically so that the witness could be made available. Id. at 672. In Rundle, the Court of Appeals found no inherent prejudice, even though counsel was appointed the eve of trial and did not have a chance to interview his client. 394 F.2d at 753.

Petitioner herein, by contrast, was appointed counsel several weeks in advance of trial; [2/] counsel was able to

---

2/ Thus, counsel was provided in excess of the ten days afforded appointed counsel as a matter of statutory right. See, Tex. Code Crim. Pro. Ann. art. 26.04(b).

confer with Petitioner and review the record of Petitioner's prior trial. The only basis Petitioner presented to the trial court in support of his motion for continuance was that he needed more time to familiarize himself with the facts of the case. Further, and more important, Petitioner has failed to show that he was prejudiced by the representation of which he now complains. In rejecting this very contention, the Texas appellate court reasoned as follows:

> The failure to grant a motion for continuance is the subject of Skillern's first ground of error. Like Sanne, he focuses upon a short time given to prepare his defense and his lack of familiarity with the record of the first trial as the chief factors authorizing the continuance. He did not, however, offer proof of facts which the denial of his motion prevented him from discovering and proving, nor did he at any time state with specificity how any lack of familiarity with the record in the first trial adversely affected his handling of the instant prosecution. Skillern's claim that assistance of counsel was rendered ineffective by failing to grant the continuance is not firmly founded or supported by the record.

609 S.W.2d at 776. Petitioner's allegations of prejudice (Petition at 14) are insubstantial at best and appear in large part to involve matters of trial strategy which cannot support a finding of ineffective assistance. Moreover, Petitioner's claim that counsel's failure to make certain objections was due to the court's denial of the motion for continuance is sheer speculation. Petitioner has utterly failed to demonstrate any causal relationship between denial of the motion for continuance and trial counsel's allegedly faulty conduct of his defense.

B. Petitioner does not have a constitutional right to more than one appointed counsel or to appointed counsel of his own choosing.

Petitioner boldly asserts that the trial court's denial of his motion for appointment of co-counsel caused him to be

denied the effective assistance of counsel. Petitioner fails to cite any authority, however, for the proposition that an indigent defendant is entitled to more than one appointed attorney or to a particular appointed counsel. A number of the Courts of Appeals have held that such a right does not exist and that the decision of which counsel to appoint an indigent defendant is addressed to the sound discretion of the trial court. United States v. Poulack, 556 F.2d 83 (1st Cir.), cert. denied, 434 U.S. 986 (1977); United States v. Tortora, 464 F.2d 1202 (2nd Cir.), cert. denied, 409 U.S. 1063 (1972); United States v. Brown, 591 F.2d 307 (5th Cir.), cert. denied, 442 U.S. 913 (1979); United States v. White, 451 F.2d 1225 (6th Cir. 1971); United States v. Davis, 604 F.2d 474 (7th Cir. 1979); United States v. Vargas-Martinez, 569 F.2d 1102 (9th Cir. 1978). This rule is based on the sound policy that a defendant's freedom of choice of counsel should not be manipulated to subvert the orderly procedure of the courts or to interfere with the fair administration of justice. See United States v. Sexton, 473 F.2d 512 (5th Cir. 1973); ABA Standards, Providing Defense Services § 2.3, comment b (Approved Draft, 1968).

As stated above, the trial court denied Petitioner's motion for additional counsel because the attorney whom Petitioner wished to represent him was engaged in other proceedings. Also as discussed above, Petitioner's allegations of prejudice are both insubstantial and not shown to be related to the trial court's denial of the motion for co-counsel. The Texas Court of Criminal Appeals specifically so found in overruling this ground of error on appeal. 609 S.W.2d at 777. Petitioner has failed to raise a substantial constitutional question worthy of this Court's consideration.

III.

PETITIONER'S CLAIM REGARDING THE PATHOLOGIST'S TESTIMONY ON FUTURE DANGEROUSNESS FAILS TO RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

Petitioner complains of the testimony of Dr. Joseph C. Rupp, a forensic pathologist, that Petitioner was likely to commit future acts of criminal violence that would constitute a continuing threat to society. [3] Specifically, Petitioner asks this Court to hold that the admission of Dr. Rupp's testimony at the punishment phase of his trial constituted error of constitutional dimension because it "severely undermined the fairness and reliability of the fact finding process at the penalty phase" (Petition at 16). If this claim is properly before this Court, which Respondent denies (See Part I), it is wholly without merit. This contention involves nothing more than the correctness of a state trial court's evidentiary ruling and does not raise a question worthy of this Court's consideration. Petitioner's attempt to elevate this contention to constitutional status is bottomed solely on the seriousness of the death sentence which was assessed. Apparently it is Petitioner's position that this Court sits to review every evidentiary ruling in every capital case. Surely this is not the law.

Even if this already overburdened Court were to freely grant certiorari in capital cases, the instant contention does not warrant issuance of the writ. Under Texas law, the opinion of an expert witness as to an accused's future dangerousness is admissible if the witness has "such skill,

---

[3] Under the Texas death penalty statute, this issue was essential to the determination of Petitioner's punishment. See, Tex. Code Crim. Pro. Ann. art. 37.071(b)(2), (e).

knowledge or experience" about human behavior "that it was probable his opinion would be of assistance to the jury in making a factual determination of whether there was a probability that appellant would commit criminal acts of violence and be a continuing threat to society in the future." Battie v. State, 551 S.W.2d 401, 407 (Tex.Crim.App. 1977). The Texas test for the admissibility of expert testimony does not raise any federal question, however. Under Rule 702, Federal Rules of Evidence, the standard is much lower:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify hereto in the form of the opinion or otherwise.

Further, as found by the Court of Criminal Appeals, admission of Dr. Rupp's testimony was harmless beyond a reasonable doubt in light of the vast amount of other evidence properly before the jury, including Petitioner's prior conviction for murder of his own brother. 609 S.W.2d at 774.

IV.

THE JURY WAS NOT MISLED AND PETITIONER WAS NOT HARMED BY ADMISSION OF THE INDICTMENT FOR MURDER WITH MALICE BECAUSE A JUDGMENT AND SENTENCE SHOWING THAT PETITIONER WAS CONVICTED OF THE OFFENSE OF MURDER WITHOUT MALICE ALSO WERE INTRODUCED.

If Petitioner's complaint regarding admission of the indictment for murder with malice at the punishment phase of his trial is properly before this Court, which Respondent denies (See Part I), it is wholly without substance. Petitioner concedes, as he must, that admission of the indictment was entirely proper under Texas law. Petitioner fails to state, however, that the judgment and sentence showing him to have been convicted of the offense of murder without malice also

were admitted in evidence (St.Tr. 2, 770). Under these circumstances the jury could not have been misled, nor could Petitioner have been harmed. This claim is frivolous.

V.

SINCE THE JURY WAS PRESENTED WITH SUFFICIENT EVIDENCE TO FIND PETITIONER GUILTY OF THE OFFENSE OF CAPITAL MURDER PURSUANT TO THE LAW OF PARTIES, HE WAS PROPERLY CONVICTED OF THAT OFFENSE; THE DEATH SENTENCE WHICH WAS ASSESSED WAS WITHIN THE STATUTORY RANGE OF PUNISHMENT AND THEREFORE WAS NOT DISPROPORTIONATE TO THE OFFENSE.

Respondent reiterates that the precise claim asserted herein has not been presented to the Texas state courts and therefore is not properly before this Court (See Part I). Further, the facts of this case render it inappropriate for determining the constitutionality vel non of a death sentence assessed one convicted pursuant to the law of parties.

In Lockett v. Ohio, 438 U.S. 586 (1978), this Court reversed on other grounds and refused to consider this identical contention. 438 U.S. at 609 n.16. Whatever merit the claim might have had in Lockett, however, it is clear that Petitioner's contention is meritless. The petitioner in Lockett joined several others in a plan to rob a pawnshop. "No one planned to kill the pawnshop operator in the course of the robbery." 438 U.S. at 590. Lockett's role in the offense was to drive the getaway car, in which she was waiting when the murder was committed. Id.

Petitioner herein, by contrast, was involved in a criminal conspiracy designed to take the life of another, and the record reflects that he played an active role in carrying out that plan. Petitioner and his co-defendant, Charles Victor Sanne, had known each other since 1956 (St.Tr. 2494) and had been "pretty good friends" for that time (St.Tr. 2495).

They shared an apartment at the time of the offense (St.Tr. 2434, 2443) and had done at least one fifty-pound marijuana deal together prior to the offense (St.Tr. 2578). They intended to consummate a drug deal with the deceased (St.Tr. 2472-73), but "put a hold" on the deal after Petitioner was informed that the deceased might be a police informant (St.Tr. 2474-75, 2498, 2512-13, 2566). Both defendants visited the deceased in his hotel room and persuaded him to leave with them (St.Tr. 2477). Sanne and the deceased departed together in one car and Petitioner followed them (St.Tr. 2480-81, 2504, 2525). When Sanne and the deceased pulled into a roadside park and stopped, Petitioner pulled his car up to the driver's side of the deceased's car to distract him so that Sanne could kill him (St.Tr. 2483-84, 2521-22, 2583-84). After Sanne shot the deceased he told Petitioner what he had done (St.Tr. 2533), and the pair fled the scene of the crime together (St.Tr. 2489-90, 2504, 2536). Petitioner was found in possession of several items of the deceased's personal property.

Tex. Penal Code Ann. § 7.01 provides, in pertinent part, as follows:

> § 7.01. Parties to Offenses
>
> (a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.
>
> (b) Each party to an offense may be charged with commission of the offense.

Tex. Penal Code Ann. § 7.02 provides, in pertinent part, as follows:

> § 7.02. Criminal Responsibility for Conduct of Another
>
> (a) A person is criminally responsible for an offense committed by the conduct of another if:

> (b) Acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense;

Respondent submits that the foregoing factual summary conclusively demonstrates Petitioner's guilt of the offense of capital murder pursuant to the Texas law of parties. The trial court charged the jury on the law of parties (St. Tr. 234) and also instructed it on the law of circumstantial evidence (St.Tr. 233), thereby enabling the jury to draw inferences supplying any lack of evidence directly connecting Petitioner with the specific acts charged in the indictment. See Pereira v. United States, 347 U.S. 1, 10 (1954); Nye & Nissen v. United States, 333 U.S. 613, 619 (1949). No constitutional infirmity exists with respect to the state's conviction of Petitioner pursuant to the law of parties:

> That states have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge.

Lockett v. Ohio, 438 U.S. at 602.

Moreover, it is important to note that the Texas capital murder statute, the constitutionality of which was upheld by this Court in Jurek v. Texas, 428 U.S. 262 (1976), provides that one commits the offense of capital murder if he "employs another to commit the murder for remuneration or the promise of remuneration . . . " Tex. Penal Code Ann. § 19.03(3). The statue by its terms provides that one may be guilty of the offense of capital murder without actually committing the killing. Because the Texas statutory provisions defining the offense of capital murder and the law of criminal responsibility are not subject to constitutional attack, and because the

record in this cause conclusively demonstrates that Petitioner was properly convicted pursuant to those provisions, it necessarily follows that the sentence of death assessed him was neither disproportionately severe nor cruel and unusual.

CONCLUSION

For the above reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

Charles A. Palmer

CHARLES A. PALMER
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

APPENDIX A

63255

In the Court of Criminal Appeals
of The State of Texas

NO. 78-772

Doyle E. Skillern,
Appellant

Vs.

The State of Texas,
Appellee

Appeal From The 36th District
Court of Aransas County
Trial Court No. 1280-2

Appellant's Brief

FILED IN
COURT OF CRIMINAL APPEALS
NOV 16 1979
Thomas Lowe, Clerk

David B. Connery, Jr.
of BROWN, SIMS & AYRE
2000 South Post Oak Road
1735 Post Oak Central
Houston, Texas 77056
(713)629-1580
Attorney for Appellant

FILED
At 9:30 A.
SEP
Clerk
By Ruby Sanchez

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

NO. 78-772

DOYLE E. SKILLERN, Appellant	§	APPEAL FROM THE 36TH DISTRICT
VS.	§	COURT OF ARANSAS COUNTY
THE STATE OF TEXAS, Appellee	§	TRIAL COURT NO. 1280-2

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS:

NATURE OF THE CASE

Appellant, Doyle Edward Skillern, was convicted of the offense of Capital Murder in the District Court of Aransas County, 36th Judicial District of Texas, on March 30, 1978, pursuant to jury verdict, and on March 31, 1978, pursuant the verdict of jury, his punishment was assessed at death.

Trial of this case commenced on March 13, 1978 and was completed with the verdict of the jury on punishment on March 31, 1978.

Following the Court's overruling of an Amended Motion for New Trial, Appellant and Co-Appellant, Charles Victor Sanne were formally sentenced to death at high noon on Friday, May 19, 1978.

On the trial of this cause, as well as on this appeal, Appellant has been represented by the undersigned Court-Appointed Counsel, and no one else.

FIRST GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CONTINUANCE AS ORIGINALLY URGED AT PRE-TRIAL HEARING HELD ON MARCH 8, 1978, AND AS RE-URGED ON MARCH 13, 1978, PRIOR TO COMMENCEMENT OF VOIR DIRE EXAMINATION OF THE SPECIAL VENIRE, AND AS RE-URGED ON MARCH 21, 1978, FOLLOWING SELECTION OF THE JURY, COMPELLING THIS DEFENDANT TO BE PUT TO TRIAL UPON A CHARGE OF CAPITAL MURDER BY AND THROUGH COURT-APPOINTED COUNSEL TWENTY-TWO DAYS FOLLOWING APPOINTMENT OF SUCH COURT-APPOINTED COUNSEL. (Amended Motion for New Trial, 5, 14, 47).

Appellant recognizes that his Motion for Continuance is addressed to the sound discretion of the Trial Court. Reed vs. State, 244 S.W.2d 821 (1952), Article 19.01, CCP, and that good cause must be demonstrated therefor. It was, and the Trial Court abused that discretion in denying the requested continuance.

Significantly, and perhaps uniquely, the state did not object to Appellant's Motion for Continuance or to that of his Co-Defendant, Sanne, (SF-44). That was the First Motion for Continuance and was heard by the Court on March 8, 1978, only five days prior to the commencement of the trial as originally set by the Court on the appointment of the undersigned attorney for this Appellant on February 20, at which time were heard all of numerous pre-trial motions filed by this Appellant and Appellant Sanne. Skillern's counsel, as did Sanne's, took the stand under oath to testify concerning the reasons why they deemed a Continuance necessary in order to represent effectively their respective clients (SF-34-47). The entirety of Volume 2 of the Statement of Facts is referred to for a particular description of the nature and character

of the pre-trial motions filed and to the summary treatment of them by the Court, including the summary denial of Motions to Suppress Evidence without benefit of an evidentiary hearing. (SF-116-125).

Preparation for trial in a case of this magnitude required at a minimum, the study of the record of the former trial herein conducted in George West, Live Oak County, consisting of 15 volumes and several thousand pages, before counsel could make an informed and sensible determination of how to conduct the defense of this case, and by reason of the Court's having set all pre-trial motions for hearing on March 8, five days prior to the commencement of trial, even the matter of legitimate discovery of the State's evidence, and other matters encompassed in Defendant's Motion for Discovery, had to be delayed until the following day, and not in Rockport, Aransas County, but in Sinton, in the office of the District Attorney. Twenty-two days were not enough, five days following hearing of pre-trial motions were not enough, and four days following the first opportunity to see the State's evidence that was made available was certainly not enough.

Appellant refers to and incorporates herein the matters sworn to in his motion for continuance, alludes to his separate and distinct motion for the appointment of additional counsel in this regard, and says that the Court's denial of his motion for continuance was the effective denial of the effective assistance of counsel, and abuse of discretion

under the totality of the circumstances in this case that requires reversal and the remanding of this case for a new trial.

SECOND GROUND OF ERROR

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR APPOINTMENT OF ADDITIONAL COUNSEL, DENYING THIS DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL (Amended Motion for New Trial, 4).

Defendant, incorporates herein each and all of the matters set forth under First Ground of Error and would show that the Court's denial of his Motion to Require the Appointment of Additional Counsel in the person of Douglas Tinker, a member of the bar of Corpus Christi, and being one in the same person who was appointed to defend, and who did defend this Defendant in the first trial hereof in Live Oak County, constituted a denial of this Defendant's right to the assistance of counsel to the effective assistance of counsel, and to the assistance of chosen counsel, whether chosen by himself or by the Court, in violation of the Sixth Amendment to the United States Constitution. Harling vs. United States, Court of Appeals, District of Columbia, June 21, 1978. No prejudice need be shown, nor must Defendant show that newly appointed counsel, as of February 20, 1978, performed ineptly, or not at all, or otherwise. There is no evidence of record to demonstrate that Douglas Tinker was ever relieved of his appointment and continuing representation of this Defendant, this Defendant's Motion speaks for itself in demonstrating his efforts to secure the continued representation of Mr.

Tinker, his "chosen counsel", the denial of which is an abridgment of a constitutional right requiring reversal of this case. See also United States vs. Watson, 496, F.2d 1125 (1973). Attached hereto as Exhibit A is this Defendant's Writ of Mandamus filed in this Court in Appeal No. 55,337 together with this Defendant's Application for Temporary Restraining Order and Injuction filed in the United States District Court, Southern District of Texas, Corpus Christi Division, all seeking relief in the form of the continuation of representation by the said Douglas Tinker of this Defendant, to no avail.

Morover, in the circumstances set forth under First Ground of Error above, and recognizing that Mr. Tinker had, in preparation for the trial of this case on the first occasion, approximately two months within which to prepare, as opposed to the undersigned counsel's twenty-two days (if we count every day as an effective day, which cannot be, see first ground of error above) then certianly the denial of the appointment of additional counsel in the person of Mr. Tinker, or at least the appointment of someone as additional counsel, was a deprivation of this Defendant's constitutional right to the assistance and effective assistance of counsel. Such denial requires reversal and a new trial of this case.

THIRD GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING DEFENDANT's MOTION TO QUASH THE INDICTMENT (NO. 19) BECAUSE SUCH INDICTMENT TOGETHER WITH ALL OTHER RELEVENT AND MATERIAL RECORDS FAILED TO DISCLOSE AFFIRMATIVELY THAT SAID INDICTMENT WAS PRESENTED SUBSEQUENT TO THE DATE OF THE ALLEGED OFFENSE. (Amended Motion

for New Trial, 11).

FOURTH GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO QUASH INDICTMENT (NO. 20) AND IN DENYING DEFENDANT'S SPECIAL PLEA IN BAR (NO. 3) BECAUSE THE CAPITAL MURDER STATUTE OF THE STATE OF TEXAS, AS ADMINISTERED AND CONSTRUED BY THIS COURT, IS UNCONSTITUTIONAL UNDER THE 8TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. (Amended Motion for New Trial, 3, 11, and 12).

The proscription of Furman vs. Georgia and Branch vs. Texas, 408 U.S. 238 (1972) holding constitutionally defective the former Capital Murder Statute of this state, by reason of the unbridled and unfettered discretion afforded the jury in assessing the Death Penalty, has not in fact been cured by the present Capital Murder Statute, Article 19.03 of the Penal Code and the complementing sections of the Code of Criminal Procedure, Section 37.071 and the three special issues that must be answered by the jury, because such special issues, particularly special issue number 2, demanding as it does that the jury, without the benefit of any definition or special instructions, make a finding concerning the predictability and probability of future human behavior regarding undefined criminal acts of violence that would make him a continuing threat to society, fails to afford the jury channelled and defined guidance and instruction as to what conduct or other factors may be appropriately considered by them. This is so, notwithstanding the opinion of the United States Supreme Court in Jurek vs. Texas, 428 U.S. 262 (1976), finding the Texas Death Penalty Statute and Procedure, on its face, not violative of the 8th and 14th

amendments to the Constitution of the United States, and implicitly holding that explanatory definitions and instructions would be required to guide the jury in making determinations regarding future dangerousness of the Defendant, or the liklihood of his being a continuing threat to society, reference being made here as well to the simultaneous decisions of the United States Supreme Court in upholding the constitutionality of the grossly similar, but vastly different, statutes of the states of Georgia and Florida. Gregg vs. Georgia, 428 U.S. 153 (1976), Proffitt vs. Florida, 428 U.S. 242 (1976). The vagueness and unfettered discretion and lack of guidance born of the submission of special issue no. 2, containing as it does the undefined requirement that the jury find a "probability" remains, as does the constitutional infirmity of the entire procedure.

Such constitutional infirmity of the Texas Capital Murder Statute and complementing provisions of the Code of Criminal Procedure require that such statutes be held unconstitutional as violative of this Defendant's rights under the 8th and 14th Amendments to the Constitution of the United States.

FIFTH GROUND OF ERROR

THE TRIAL COURT ERRED IN COMPELLING THIS DEFENDANT TO EXERCISE HIS PEREMPTORY CHALLENGES, DURING VOIR DIRE EXAMINATION OF THE JURY IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 35.13, CODE OF CRIMINAL PROCEDURE, AND IN DENYING TO THIS DEFENDANT THE RIGHTS WHICH ANY DEFENDANT IN A NON-CAPITAL FELONY CASE WOULD HAVE TO SELECT A PANEL OF JURORS, NOT OTHERWISE DISQUALIFIED BY

PROPER CHALLENGES FOR CAUSE, AND THEN TO BE ABLE TO EXERCISE SENSIBLY AND WITH CIRCUMSPECTION AFTER VOIR DIRE OF A SUFFICIENT NUMBER, THOSE LIMITED PEREMPTORY CHALENGES AVAILABLE TO HIM, IN CONTROVENTION OF THIS DEFENDANT'S RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE STATE OF TEXAS AS WELL AS THE SAME CLAUSES OF THE CONSTITUTION OF THE UNITED STATES, AND ALSO IN VIOLATION OF THIS DEFENDANT'S RIGHTS TO THE ASSISTANCE OF COUNSEL AND THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The selection of the jury proceeded with individual examination of each veniremen separately and apart from the remainder of the special venire following which each potential jurror was passed first to the state and then to the Defendants for the exercise of challenge for cause, and upon denial thereof, for peremptory challenge. Defendant, upon conclusion of the voir dire examination of Mrs. Fowler, attempted to reserve his right to exercise any peremptory strike respecting this juror, claiming the right to exercise the limited number of peremptory strikes in the same manner that would be accorded this Defendant were the indictment and trial for a non-capital felony, and was compelled by the Court to exercise peremptory challenge at that time, or waive it. (SF-287, 288). Defendant reiterated the same objection and reiterated his claim of right. (SF-328, 329).

Articles 35.13 and 35.25 and 35.26 of the Code of Criminal Procedure do not explicitly define a procedure that must or should be followed in the selection of a jury in a Capital Murder case. Be that as it may, it is clear that the procedure contemplated by Articles 35.25 and 35.26

accord a Defendant the right to exercise his peremptory challenges following the selection of a panel of jurors, not otherwise disqualified or exempt or subject to a challenge for cause, sufficient in number so that such Defendant may, following voir dire examination of all of such jurors, look back over his list, sensibly make an assessment of which potential jurors may be the most beneficial or conversely most harmful, and then, and only then, strike from the list those whom he deems obviously most objectionable. Yet in this case, and as commonly practiced in Capital Murder cases in this state, the same right is denied a Capital Murder Defendant, as it clearly was here, for the procedure forced upon this Defendant requires an instanter determination, immediately following voir dire examination, as to whether or not to exercise such strike, or looking on down the list of potential jurors, use a crystal ball, that he has not, to guess whether or not one or more on down that list may be more or less objectionable than that juror which may indeed be forced upon him right now, should he elect not to peremptorly strike the juror on the witness stand, he must guess. the non-capital felony defendant has the right to counsel and examination of those jurors on down the list before he is put to the exercise of his peremptory challenges. That the same procedure has to be followed by the prosecutor saves it not, for the crux of the matter inheres in the invidious, unwarranted and unconstitutional classification of the Capital Murder Defendant to endure such a procedure in

contrast to the apparently prescribed, and routinely followed, method of jury selection that the non-capital felony Defendant always has.

The Constitution of this State as well as the United States, in the due process and equal protection clauses, requires that classifications be not arbitrary; this classification of the Capital Murder Defendant is arbitrary. The procedure is also arbitrary and discriminatory and denied to this Defendant the effective assistance of counsel guaranteed him by the 6th Amendment to the United States Constitution, for the same reasons recited above.

These errors require that the procedure for selection of the jury in this case be declared unlawful and unconstitutional under the constitutional provisions abovementioned.

SIXTH GROUND OF ERROR

THE TRIAL COURT ERRED IN OVERRULING THIS DEFENDANT'S CHALLANGE FOR CAUSE TO THE PROSPECTIVE JUROR, JON DIGRANES. (Amended Motion for New Trial, No. 18).

The voir dire examination of this juror is contained at pages 384-426, S.F. This Defendant's challenge for cause should have been sustained, and it was an abuse of discretion for the Court to overrule same, as it was to overrule such challenge under article 35.16, CCP, because the juror's plain remarks were to the effect that he considered an indictment to be some evidence of guilt, contrary to the Court's instruction, and because he would require the Defendant to come forward with evidence on his own behalf. S.F. 400, 403, 404, 405. This prospective juror was likewise properly

challenged for cause for the reason that he stated that he could not consider the full range of punishment, the overruling of which challenge was likewise an abuse of discretion by the Court and error under Article 35.16, CCP, the consequence of which was the forcing of this Defendant to exercise a peremptory challange.

SEVENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN EXCUSING PROSPECTIVE JUROR WILLARD ANDERSON, ON THE COURT'S OWN MOTION (Amended Motion for New Trial, No. 22).

The testimony of this 79 year old prospective juror on voir dire is contained at pages 689-700, S.F. It reflected a great deal of mental awareness, many sensible questions having been directed to the State's Attorney, and some minimal defect of hearing, none of which was objected to by the State nor was any challenge timely made by the State to this prospective juror. Rather, the Court took it upon itself, without the benefit of any testing, and without giving such prospective juror even the opportunity to demonstrate his ability, or the lack of it, to hear adequately a person sitting in the witness chair from a position in the jury box. No absolute disqualification having been demonstrated, and no challenge having been leveled by the State's attorney, the Court abused its discretion in excusing such prospective juror. Bodde vs. State, 568 S.W.2d 344 (1978).

EIGHTH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADVISING PROSPECTIVE JUROR OLLIE GRAY, IMPLICITLY, THAT THIS DEFENDANT MAY HAVE HAD A PRIOR FELONY RECORD. (Amended Motion for New Trial, No. 23).

In response to questioning by counsel for Co-Defendant Sanne, regarding probation and the prospective juror's ability to consider the full range of punishment, the Court stated:

> "Well, have you filed a sworn statement that your clients have not been convicted of a Felony?" (S.F., 754)

Remarks by the State's attorney immediately preceding the injection of that remark by the Court properly handled the matter, as it could have in conference with the Court out of the hearing of the prospective juror. Moreover, this Defendant had not questioned any prospective juror concerning eligibility for probation. Such remark by the Court was clear advice to the juror that one or both Defendants may have a prior Felony Criminal Record. This Defendant objected to such remarks by the Court at the first opportunity out of the presence and hearing of the juror (S.F., 757).

NINTH GROUND OF ERROR

THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR FRANK GARZA (Amended Motion for New Trial, No. 25).

The testimony of prospective juror Frank Garza on voir dire demonstrated clearly that he had consciencious scruples against the infliction of the Death Penalty. That is not, of course, enough under the decision in Witherspoon vs. Illinois, 391 U.S. 510, as this Court has recognized. Mr. Garza's testimony is contained at S.F. 950-959, and that testimony, showing that such prospective juror would not, under any and all circumstances, vote against the Death

Penalty, makes the sustaining of the State's challenge improper. See Harris vs. State, 457 S.W.2d 903 and Davis vs. Georgia, 429 U.S. 122 (1976).

TENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN OVERRULING THIS DEFENDANT'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR OSCAR GRANGER (Amended Motion for New Trial, No. 32).

Based upon the testimony given by Mr. Granger during voir dire examination, S.F. 1129-1155, it was clear that Mr. Granger had prior knowledge and considered this trial to be a re-trial based upon a technicality, that he had concluded that an essential element of the State's case was already proved, ie., that a murder had been committed (not a homicide), and that it would be incumbant upon the Defendant to produce evidence that such had not been the case, and, lastly, the prospective juror candidly admitted (S.F. 752) that such knowledge and conclusions "might necessarily effect your decision or your service as a juror in arriving at a verdict here in this case," to which the juror answered, "It's a possibility it could." It is respectfully submitted that it is nothing more than frivolous semantics, in the light of such cadid admissions of such dimension, to say that with a little more effort and rehabilitation, the juror could probably lay aside such knowledge and conclusions and try to abide by the instructions of the Court. Defendant's challenge for cause having been overruled, Defendant was put to the exercise of a peremptory strike. The Court's overruling of such challenge of cause was error under Article 35.16 CCP.

ELEVENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING THIS DEFENDANT'S MOTION FOR MISTRIAL UPON EXCUSING JUROR DOROTHY TURNER AFTER SHE HAD BEEN IMPANELED AS THE FIRST JUROR, FOR MEDICAL OR HEALTH REASONS. (Amended Motion for New Trial, No. 39).

Mrs. Turner was, following voir dire examination, sworn and impanelled as the first juror in this case. S.F. 179-214. The evidence plainly demonstrated that she was not fit in fact to serve as a juror. S.F. 1343-1368. Nonetheless, without the consent of Defendant and his counsel, the Court is without authority to proceed to organize a jury by selecting another juror, and a mistrial should have been declared at that point. Houston vs. State, 287 S.W.2d 643 and Articles 35.05 and 35.16, CCP. No provision for the selection of alternates is provided. This Defendant also made objection to the Court's ruling that it would proceed to select two additional jurors, which was overruled. S.F. 1367.

TWELFTH GROUND OF ERROR

THE TRIAL COURT ERRED IN OVERRULING THIS DEFENDANT'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR MRS. JAMES C. BRACHT AND IN DENYING THIS DEFENDANT THE RIGHT OF EFFECTIVE CROSS-EXAMINATION OF SUCH PROSPECTIVE JUROR (Amended Motion for New Trial, No. 43).

Mrs. Bracht's testimony (S.F. 1503-1533) demonstrated that she considered the necessity of another trial in this case rather silly, that she had at least an inclination to believe the Defendant's guilty and, following voir dire examination by the State's attorney and the attorney for Co-Defendant Sanne, upon attempting to determine by what is submitted to be proper questioning, what would or would not

be required to remove, if possible, such predilection from the juror's mind, upon objection by the State's attorney, this Defendant's examination of such juror was cut off (S.F. 1532), denying this Defendant the right to develop fully any proper grounds for challenge for cause, as well as cutting this Defendant off from that cross examination guaranteed him in his right to cross examine prospective jurors in order to sensibly utilize his peremptory challenges. Moveover, in view of her testimony concerning the silliness of re-trial, it is respectfully submitted that such testimony amounts to a prejudice against this Defendant, concerning which the trial Court has no discretion. The overruling of Defendant's Challenge for Cause, compelling him to exercise a peremptory strike, was error, in violation of Article 35.16, CCP, and in contravention of this Defendant's right to counsel and to the effective use of counsel under the 6th Amendment to the United States Constitution, and as well a denial of his right of cross-examination.

THIRTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING THIS DEFENDANT'S MOTION FOR SEVERENCE AS REURGED BY THIS DEFENDANT AT THE TIME THE STATE ANNOUNCED THAT IT HAD RESTED, AT WHICH TIME CO-DEFENDANT SANNE ANNOUNCED HIS INTENTION TO TAKE THE WITNESS STAND TO TESTIFY IN HIS OWN BEHALF (Amended Motion for New Trial, No. 80).

Defendant recognizes that the granting or denial of a Motion for Severance in this instance was discretionary with the Court. Defendant submits that the trial Court abused that discretion. Until such time as Co-Defendant Sanne

announced his intention to take the stand and testify in his own behalf, and did so, S.F. 2466-2567, there was no direct evidence of this Defendant's (1) presence in the Motel room in Beeville with Co-Defendant Sanne or (2) his presence at the roadside park where the shooting took place. Permitting the trial to proceed without a severance as to this Defendant, when his Co-Defendant's testimony, in seeking to establish the defense of self-defense, put this Defendant in the motel room, provided evidence upon which the jury could conclude that this Defendant acted in concert with Co-Defendant Sanne in what transpired at the scene of the shooting at the roadside park, and in which State was permitted to cross-examine the Co-Defendant Sanne, eliciting thereby evidence of extraneous offenses committed not simply by Co-Defendant Sanne, but by this Defendant as well, namely, extraneous offenses done together in concluding drug deals, fronted, or otherwise, theft of an automobile, etc., was extremely prejudicial to this Defendant, and was an abuse of discretion by the Court. Article 36.09, CCP.

FOURTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN DENYING THIS DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BY REASON OF UNLAWFUL SEARCH AND SEIZURE AND ARREST AND IN ADMITTING INTO EVIDENCE, OVER THIS DEFENDANT'S OBJECTION, ALL EVIDENCE SEIZED AND/OR OBTAINED AS A RESULT THEREOF. (Amended Motion for New Trial, Nos. 61, 62, 63, 64, 65, 66, 67, 68, 69: 46-49, inclusive: 73).

Having denied both Defendants the opportunity to develop evidence on their Motion to Suppress prior to the commencement of trial, nonetheless the Court did permit a hearing out of

the presence of the jury during the course of the trial in which the State called as its witness one Hector Sanchez (S.F. 2055-2084). Mr. Sanchez testimony reflected that he had received a telephone call from agent Dennis Vickery, asking that he do Mr. Vickery a favor and keep on the lookout for the Camaro vehicle, believed to be driven by and occupied by this Defendant and Co-Defendant Sanne, as well as agent Randel's vehicle, at once advising that agent Randel was engaged in an undercover operation and that agent Randel had departed around 7:00 p.m. in the evening, Mr. Vickery's call to Mr. Sanchez having been at approximately 10:45 p.m. Mr. Sanchez testified that agent Vickery told him nothing about the two Defendants, but advised him to be on the lookout around Gary Jackson's house. (S.F. 2055-2057). Mr. Sanchez then obtained the assistance of Mr. Trevino and his partner, Tom Daniel, and located the Camaro vehicle at a 7-11 store in Harlingen (S.F. 2058) at approximately 12:05 a.m., whereupon Mr. Trevino called the Department of Public Safety to obtain a vehicle registration check on the Camaro automobile, which was received within minutes of first finding the Camaro at the 7-11 store (S.F. 2070). Not until some 15 or 20 minutes later, after following the Camaro vehicle from the 7-11 store, and only after concluding that the vehicle was indeed going to Gary Jackson's house, did Mr. Sanchez and the other officers stop the Camaro vehicle which this Defendant drove. Mr. Sanchez testified that if, in fact, the reportedly stolen nature of the automobile had

been his reason for stopping the Camaro vehicle and its occupants, he would indeed have done so immediately upon ascertaining the stolen character of the vehicle. (S.F. 2072). Moreover, officer Sanchez testified that he had sufficient time to get a warrant (S.F. 2075).

Notwithstanding the Court's attempts to characterize the evidence as indicating flight of these Defendants, the plain testimony of the officer negates any such inference, for he only stopped the Camaro vehicle on concluding that it was going to Gary Jackson's house and that it would be more difficult for him to carry out his purpose at Jackson's house, officer Sanchez avowing that he knew Jackson's reputation. It is likewise plain that officer Sanchez had abandoned, as a basis for his stopping the Camaro vehicle, the reportedly stolen character of the vehicle, else he would have done it instanter at the 7-11 store. There remains evidence of only one reason for stopping the Camaro vehicle: that was the telephone call and the information related therein from agent Vickery to agent Sanchez. That contained no information about this Defendant or his Co-Defendant. Officer Sanchez testified that he stopped the vehicle soley and conclusively by reason of the contents of that communication from agent Vickery, plus his years of experience. That testimony can permit of one inference: an inarticulate hunch which led to an unconstitutional arrest and search. Benton vs. State, 576 S.W.2d 374, Tunnell vs. State, 554 S.W.2d 697, Terry vs. Ohio, 20 L.Ed.2d. 889. Certainly an investigatory stop and

the officer's concomitant right to perform a frisk or pat search for weapons can in no wise permit a general exploratory search of the vehicle, as was done in this case. It was purely officer Sanchez' hunch that Randel might well occupy the vehicle. It is also clear from his testimony that the weapon found on Defendant Skillern's person formed no basis for the subsequent search or the arrest, for it was not a until the following morning that he recalled and communicated to another agent his having seen a similar weapon in possession of agent Randel at some time in the past in Portland.

There having been time to obtain a warrant, during the surveillance by three officers in two vehicles, officer Sanchez having abandoned any basis in the reportedly stolen character of a vehicle as a reason for his stopping same, and having no more than an inarticulate hunch based upon agent Vickery's communication to him for such stop, the subsequent arrest and all evidence obtained as a result thereof were clearly inadmissible. Wong Sun vs. U.S., 371 U.S. 471.

FIFTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE OVER THIS DEFENDANT'S OBJECTION, THE TESTIMONY OF DOCTOR JOSEPH C. RUPP IN ITS ENTIRETY DURING THE PUNISHMENT PHASE OF THIS TRIAL BECAUSE DOCTOR RUPP WAS SHOWN TO BE INCOMPETENT TO RENDER THE OPINION TESTIMONY THAT HE DID, AND SUCH TESTIMONY INVADED THE PROVINCE OF THE JURY. (Amended Motion for New Trial, No. 101).

Although qualified during the guilt or innocence stage of this trial as a forensic pathologist and having testified

that he has been a professional pathologist since approximately 1961, engaging solely and exclusively in that specialty, nonetheless some opinions rendered by Doctor Rupp during the guilt or innocence stage of the trial (S.F. 1692-1742) would appear strained, namely, anyone's ability to render an opinion after the fact of the actions of the decedent prior to his death, nonetheless those opinions were admitted in evidence.

However, during the punishment phase of this trial, Doctor Rupp testified (S.F. 2816-2850), in sum, that he possessed no professional degrees or experience in the fields of psychiatry or psychology. The trial court denied this Defendant the right to Counsel and the right to cross-examination of this witness in attempting to question him regarding his qualifications to engage in the practice of psychiatry and indeed assumed the role of the prosecutor in this instance, the witness' repeated remarks being only that he was liscenced to practice medicine and surgery in the State of Texas.

In order to authorize the use by the prosecution of Doctor Rupp's testimony concerning the predictability of future human behavior, it was necessary that the trial court determine that behavior patterns of this Defendant "are so related to some scientific profession as to be beyond the knowledge of the average layman;" and that Doctor Rupp had such skill, knowledge or experience in the field of psychiatry that it was probable his opinion would be of assistance to

the jury in making a factual determination of whether there was a probability that Skillern would commit criminal acts of violence and be a continuing threat to society in the future. Battie vs. State, 551 S.W.2d 401. Thus, the trial court would have to conclude based upon common knowledge, and implicitly, that there being no evidence of any type of examination of this Defendant, psychiatric or otherwise by any medical practitioner, that this Defendant's behavior patterns were beyond the knowledge of layman, and that Doctor Rupp's knowledge and experience in the field of predictability of future human behavior would assist the jury. The record is silent. It contains no evidence whatsoever upon which anyone could find that Doctor Rupp possessed such qualifications. Patently, cutting up dead bodies, weighing brains and livers, and examining tissues under a microscope during a professional career of almost 20 years, does not, in the common knowledge of anyone, qualify one to predict, without benefit of any examination of the Defendant, future human behavior. Indeed, the General Practitioner referred to by Doctor Rupp as commonly treating emotional problems of patients, would clearly be more qualified than Doctor Rupp in that regard. If the entire field of psychiatric expertise be questioned concerning the validity of such an ability to predict future dangerousness, 30 Baylor Law Review 35, 55 Texas Law Review 1343, including recognition of the plain fact that empirical studies have demonstrated that such opinions are not accurate, how much less credible can be the

opinions of a professional pathologist.

There was simply no basis, either in common knowledge, or in evidence, upon which the trial Court could find Doctor Rupp qualified to render such opinion testimony. Its prejudicial effect was incalculable. Smith vs. Estelle, 445 F. Supp. 647 (U.S. District Court, Dallas, 1977) condemned, at least, the surprise element. The admission of incompetent expert testimony concerning the crucial special issue no. 2 in a Capital Murder case, special no. 1 and 3 having in effect been already determined by the guilt or innocence phase of the trial, cannot be said to be harmless, particularly when it came from the same mouth that rendered opinion testimony concerning the "deliberateness" in effect on the guilt or innocence stage.

SIXTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY OF EVA GONZALES OF AN EXTRANEOUS CRIMINAL TRANSACTION AS WELL AS THE TESTIMONY OF ERNEST M. "RED" ANDREWS IN THAT REGARD AND CONCERNING A 38 CALIBER SMITH AND WESSON REVOLVER. (Amended Motion for New Trial, No. 58, and 78).

The testimony of Miss Gonzales (S.F. 1999-2013) and that of Ernest M. "Red" Andrews (S.F. 2431-2459) effectively informed the jury that Miss Gonzales' automobile had been reported stolen by her, following her having loaned it to the Defendants on at least one occasion, that Red Andrews had been with the Defendants when a key was made with which to operate the Camaro vehicle belonging to Eva Gonzales, and the obtaining by these Defendants of a 38 caliber Smith & Wesson revolver (States Exhibit No. 57) and this Defendant's

handling and firing the gun at Red Andrews' home in Austin, Texas.

The evidence of these two witnesses as related above did not bear on any contested issue of fact, including identity, but was introduced for, and showed only, the commission of an extraneous criminal transaction. Such was prejudicial error, allowing the jury to consider evidence of criminal transactions not revelent or material to any issue upon the trial of this case, to this Defendant's prejudice. Coleman vs. State, Court of Criminal Appeals No. 55242 (11-8-78), Powell vs. State, 478 S.W.2d 95. To the same effect was the evidence brought out on cross examination of Co-Defendant Sanne (S.F. 2492-2556) regarding other drug transactions, and implicating this Defendant therein.

SEVENTEENTH GROUND OF ERROR

TRIAL COURT ERRED IN ADMITTING IN EVIDENCE OVER THIS DEFENDANT'S OBJECTION, STATE'S EXHIBITS NOS. 31A, 21, 29, 57, 63, 64, 60, AND 62, AND 51 AND 65-71, INCLUSIVE, ALL OF SUCH EVIDENCE HAVING BEEN ADMITTED IN VIOLATION OF THE RULES OF EVIDENCE PRESCRIBED BY THE CODE OF CRIMINAL PROCEDURE, THE CUMULATIVE EFFECT HAVING BEEN PREJUDICIAL TO THIS DEFENDANT'S RIGHT TO BE TRIED UPON, AND BE CONFRONTED WITH, LEGALLY COMPETANT EVIDENCE. (Amended Motion for New Trial, Nos. 50, 51, 53, 54, 56, 57, 62, 70, 71, 74, 82 and 83).

EXHIBIT 31A: Exhibit 31A was introduced through the testimony of the State's initial witness, one Candace Franklin (S.F. 1634-1656), showing the body of the decedent in an automobile. Miss Franklin had testified that she saw no one in the automobile she had observed at the roadside park. Having tried this case once, the State well knew that it had

ample and sufficient witnesses who could and would identify the person of the decedent as the occupant of the vehicle, close in time to the observations of Miss Franklin. Her testimony having been incompetent to place the decedent in the automobile at the time of her observation, the only purpose for which such evidence was offered, and admitted over objection, was to inflame prejudice in the minds of the jurors. Such exhibit was not an accurate portrayal or representation of what the witness had observed. Cavazos v. State, 365 S.W.2d 178, Whaley v. State, 367 S.W.2d 703.

EXHIBIT 21: This exhibit was admitted through the testimony of agent James Dalrymple (S.F. 1761-1791) over the objections of Defendant. Agent Dalrymple testified that he found exhibit 21 on agent Randal's desk on the day on which the decedent's body was found at about 9:05 a.m., and that during the preceding evening, at his desk some 8 feet distant from agent Randal's desk, he observed agent Randal make a telephone call and contemporaneously write something. Agent Dalrymple did not identify exhibit 21 contemporaneously with agent Randal's presumeably having made it, but simply found it on his desk the following morning. He could identify agent Randal's handwriting from many years experience, but obviously agent Dalrymple could not testify to what was communicated to agent Randal in the telephone conversation, if it be presumed that agent Randal was writing down what was in fact communicated to him in such telephone conversation, for that would be hearsay. Exhibit 21 was not qualified as

any type of record or memorandum made in the ordinary course of business by agent Randall, and on its face it obviously cannot qualify as such. Exhibit 21 was simply an attempt to circumvent the hearsay nature of the telephone conversation by agent Randal with an unidentified third party. Moreover, that memorandum, exhibit 21, cannot qualify as a memorandum of past recollection recorded, for to do so would be to say that agent Dalrymple is qualified to testify that if the decedent Randal were here, he could not relate what was communicated to him in the telephone conversation, again assuming that he wrote down something respecting that telephone conversation, and that he made such a memorandum comtemporaneously with it and recognizes it as such. Exhibit 21, under any characterization of the evidence, was patently inadmissable hearsay, forming a link of identification with Gary Jackson and containing obvious writings referring to drugs. Moreover, it is submitted that agent Dalrymple's testimony shows, his having been seated at a distance of some eight feet, that he could not possibly identify the writing contained in Exhibit 21 as having been made by agent Randal at the time about which he testified, as opposed to having been made at some other time. The admission of this exhibit was in violation of the Rules of Evidence as prescribed by Article 38.01 Code of Criminal Procedure.

EXHIBIT 29: This exhibit, consisting of two pages of what perported to be serial numbers of United States currency in the handwriting of agent Dennis Vickery, and identified

as such by him (S.F. 1864-1973) was erroneously introduced because such document was clearly hearsay, as developed for the first time during cross-examination of agent Vickery at which time Defendant moved that it be stricken. The evidence clearly established that agent Dennis Vickery did not personally observe the serial numbers or the currency in the hands of agent Randal, who was seated at the opposite end of the bed, but simply wrote down and made a memorandum of what was recited orally to him by agent Randal. The admission of such testimony and exhibit 29, and the overruling of this Defendant's motion for mistrial because of that admission, was error, and its admission was erroneous under Article 38.01, Code of Criminal Procedure. Compounding the error was the trial court's admission, over this Defendant's objection, of agent Vickery's testimony as to having next seen the currency represented by State's exhibit 29 at the Harlengen Police Department on October 24, 1974, and likewise overruling this Defendant's Motion for Mistrial.

EXHIBIT 57: This exhibit, a 38 caliber revolver, was admitted over the objection of Defendant following the testimony of Ranger James R. Peters (S.F. 2032-2055). No proper predicate was made for the introduction of such revolver because there was no identification of it as being the revolver that belonged to this Defendant or to the Defendants jointly, or otherwise, it simply being a 38 caliber revolver, and the fact that other testimony demonstrated that agent Randel was killed by bullets fired from a

38 caliber revolver in no wise lends any credence to that fact being connected with this particular revolver. The introduction of this exhibit was erroneous, in violation of Article 38.01, Code of Criminal Procedure.

EXHIBIT 63 & 64: These exhibits were the test bullets fired by balistics expert Fred Rymer of the Department of Public Safety (S.F. 2297-2344). His testimony reflected that his examination and testing could not demonstrate anything more than the fact that the bullets were fired from a Smith & Wesson revolver of a general type, of which the 38 caliber revolver (State's exhibit 57) was one of a given number, as opposed to the bullets having been fired from a revolver of different manufacture, for example, Colt, of which a like number had been manufactured, or approximately so. The introduction of such exhibits was in violation of Article 38.01, Code of Criminal Procedure.

EXHIBITS 60 & 62: These two photographs, both of the decedent's body as seated in the Pontiac automobile were cumulative and of no probative value other than to inflame prejudice in the minds of the jurors, and were admitted in evidence, over Defendant's objection. They were of no probative value in tending to prove or disprove any prosecution theory or disputed issue of fact, and their introduction in evidence was error in violation of Article 38.01, Code of Criminal Procedure.

EXHIBITS 51, 65-71, inclusive: These exhibits, introduced through the testimony of Ranger Glenn Krueger (S.F. 2272-

2297, 2600-2649) were clearly inadmissable and of no probative value in tending to prove any prosecution theory or disputed issue of fact, all being diagrams of what was otherwise physically described and photographed. Opinion testimony by Ranger Krueger concerning apparent crossing of tire tracks at the roadside park was error, all after the State's witnesses admitted that examination and testing of the samples made from the tire tracks were inconclusive and of no probative value in tending to connect the Camaro automobile operated by this Defendant with that which was at the roadside park. The introduction of such testimony and the exhibits was error in violation of Article 38.01, Code of Criminal Procedure.

EIGHTEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE, OVER THIS DEFENDANT'S OBJECTION, THE TESTIMONY OF CRUZ SANCHEZ CONCERNING DEFENDANT SANNE'S REPUTATION FOR TRUTH AND VERACITY AND IN OVERRULING THIS DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING THE STRIKING AND INSTRUCTION TO THE JURY TO DISREGARD ONE QUESTION PROPOUNDED TO THIS WITNESS BY THE PROSECUTOR. (Amended Motion for New Trial, No. 84).

The testimony of Corpus Christi Police Officer Cruz Sanchez called as a rebuttal witness by the State to rebut and diminish the credibility of Co-Defendant Sanne following his having taken the witness stand, is contained in S.F. 2651-2665. The Court having first denied both Defendants the right to determine whether or not the proper predicate could be laid by the State for the introduction of Officer Sanchez' testimony to the effect of that Co-Defendant Sanne's reputation for truth and veracity was bad, on voir dire out of the presence and hearing of the jury, stating

that the Defendants could develop that on cross-examination, the State was permitted to introduce such testimony in evidence without laying any predicate respecting where, and for what period of time, or inclusive periods of time, the officer knew, or could gain knowledge of Sanne's reputation for truthfulness and veracity. The State was further permitted to ask, and the witness to answer, to the effect that Co-Defendant Sanne would not be entitled to belief under oath, according to his reputation.

On cross-examination, finally in voir dire, it was developed that Officer Sanchez based his entire testimony upon his investigation of something back in 1971, that he had no knowledge concerning any community in which Defendant Sanne thereafter resided. The withdrawal by the State of the second question as to whether or not Mr. Sanne's reputation would allow him to be entitled to be believed under oath, and the admonition to the jury to disregard it, could not cure the error, for the obvious reason that there was no predicate made for the introduction of any testimony at all by officer Sanchez, and therefore the entire testimony was incompetent and prejudicial, and a mistrial should have been declared. Article 38.01, Code of Criminal Procedure.

NINETEENTH GROUND OF ERROR

THE TRIAL COURT ERRED IN OVERRULING THIS DEFENDANT'S OBJECTIONS TO THE COURT'S CHARGE AND IN FAILING TO GRANT DEFENDANT'S SPECIALLY REQUESTED CHARGES AND DEFINITIONS DURING THE GUILT OR INNOCENCE PHASE OF THE TRIAL.

1. The Court erred in failing to accurately set forth

the law applicable to the case in paragraph 1 of the charge in defining the offense of Capital Murder, and in paragraph 2 in defining the offense of Murder, because such portions of the charge, although abstractly defining the offenses, would permit the jury to infer that the offense charged in the indictment was committed by either committing the offense of robbery, or attempting to commit the offense of robbery, when the indictment charged both: "in the course of committing and attempting to commit robbery;" and in both paragraphs 1 and 2 in failing to charge the jury that the offenses of Capital Murder or Murder must be committed without legal justification. The same basic objections apply to paragraph 3 of the charge.

2. The Court erred, in paragraph 4 of the charge in rendering certain definitions, to accurately set forth the law applicable to the case, particularly respecting the definition of "conspiracy", because such definition essentially submitted an issue not raised by the evidence or charged by the indictment and wholly failed to exclude any consideration by the jury of the conduct of this Defendant respecting his actions with Co-Defendant Sanne in attempting to commit what is plainly a felony offense, namely, the arranging of a sale of illegal drugs, in consideration of what would, under the charge contained in the indictment, constitute a conspiracy, for the jury could plainly consider that under such definition if this Defendant engaged in conduct with his Co-Defendant that would constitute <u>any</u> felony offense, including drug

transactions, that indeed he would be "acting together" as charged in the indictment and be a guilty conspirator, and such definition was, therefore, also a comment upon the weight of the evidence. The same error carries over into paragraph 5 of the charge, in failing to exclude from the jury's consideration the same evidence of conduct that could amount to a felony in defining the requirements of circumstantial evidence. Paragraph 5 was, therefore, likewise a comment upon the weight of the evidence.

3. The Court erred in Paragraph 6 of its charge, defining criminal responsibility of one for the conduct of another, again because it failed wholly to diferentiate "the offense" concerning which it would be necessary for the jury to find that this Defendant acted with intent to promote or assist another in commission of "the offense", permitting the jury, by its failure to exclude from their consideration, to consider any evidence, an abundance of which there was, of Defendant Skillern's acting together with Defendant Sanne in an illicit drug transaction, or the furtherance thereof, with agent Randel, in permitting the jury to consider that if this Defendant's conduct was committed in furtherance of the "unlawful purpose", not necessarily that charged in the indictment, (robbery and attempted robbery) that he would be guilty of a conspiracy and acting together with Co-Defendant Sanne, and such charge was therefore a comment upon the weight of evidence and permitted the jury to consider as evidence of guilt conduct by this Defendant not charged in

the indictment.

4. The Court erred in Paragraph 7 of the charge in failing to distinctly set forth the law applicable to the facts of the case, and in commenting upon the weight of the evidence, because the very same definition of criminal responsibility as contained in Paragraph 6 is carried forward specifically in Paragraph 7, in attempting to apply the abstract law to the conduct in question, thus again permitting the jury to find that if the Defendant Skillern engaged in conduct that would constitute any felony, not necessarily the commission and attempting to commit robbery as charged in the indictment, that he would be a party to the offense committed by Defendant Sanne. It should be noted further that Paragraph 7 of the charge specifically negated the application of the law of self-defense as availing Defendant Skillern anything, in consideration of the issues submitted to the jury during the punishment phase as hereinafter noted.

5. The Court erred in Paragraph 8 of the charge in failing to accurately set forth the law applicable to the case, for the same reasons hereinabove stated, and for the further reason that Paragraph 8 submitted an issue not raised by the evidence, there having been none that this Defendant acted alone and it is further a comment upon the weight of the evidence because the same conduct and charge had essentially been made in Paragraph 7 of the charge.

6. The Court erred in failing to distinctly set forth

the law applicable to the case in Paragraph 9A of the charge and in applying it to the issues raised by the evidence again, by failing to exclude from the jury's consideration this Defendant's presence in the Beeville area for the purpose of making a drug sale from their consideration of his conduct in acting with his Co-Defendant as a "party", and such charge was, therefore, also a comment upon the weight of the evidence. The Court also erred in its charge under all of the remaining subdivisions of Paragraph 9, respecting voluntary manslaughter, legal justification for the use of deadly force, because such charge in effect would permit the jury to give this Defendant the benefit of the defense of the conduct of his Co-Defendant respecting voluntary manslaughter, but not self-defense, for the Court had theretofore, in Paragraph 7, denied to this Defendant the applicability of the law of self-defense in attempting to apply the law to the facts. The charge wholly failed to correctly apply the applicable law to the case and to the issues raised by the evidence, because from the outset, as herein above enumerated, it failed to tell the jury that the offense of murder must be committed without justification in the first instance, and in failing to carry forward that basic premise, effectively denying the jury's consideration of this Defendant's conduct and any justification available to him as a defense.

7. The Court erred in Paragraph 10 of the charge in failing to distinctly set forth the law applicable to the

case and the issues raised by the evidence again in failing to exclude from the jury's consideration all acts or declarations made by Co-Defendant Sanne respecting a contemplated drug sale, and such charge was therefore a comment upon the weight of the evidence.

8. The Court erred in Paragraph 15 of the charge, in failing to accurately apply the law applicable to the case for such charge would permit the jury to consider as evidence statements of counsel for the State made during the course of the trial or during argument, unless the jury found that such were not supported by the evidence, or arguments or statements concerning the law unless the jury found that such were not in harmony with the law contained in the charge, and such paragraph was therefore misleading and confusing, and constituted a comment upon the weight of the evidence by the Court.

9. The Court erred in denying this Defendant's specially requested instruction, applying the law accurately to the case and the issues raised by the evidence, and specially requiring the jury to find, among other things, that this Defendant's conduct as a "party" would have to be with the intention to promote or assist his Co-Defendant in the commission of the offense of robbery or the attempt to commit such offense.

10. The Court erred in refusing this Defendant's specially requested instructions, in connection with the definition of criminal responsibility of one person for the

conduct of another, respecting mere association by a person on trial with another, mere knowledge of the commission of a crime standing alone, and mere possession by one of property belonging to another standing alone, and mere presence of this Defendant at the scene of a crime.

Each and all of the foregoing errors by the Court in its charge, both of omission and commission, were prejudicial to this Defendant's right to be tried upon the charge made by the indictment, and the legally competent evidence introduced in support of such charge, in accordance with article 36.14, Code of Criminal Procedure.

TWENTIETH GROUND OF ERROR

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE, OVER THIS DEFENDANT'S OBJECTION, STATE'S EXHIBIT 74, THE INDICTMENT ALLEGING MURDER WITH MALICE AFORETHOUGHT OF ONE MILTON SKILLERN, DURING THE PUNISHMENT PHASE OF THE TRIAL, AND LIKEWISE IN ADMITTING THE TESTIMONY OF ERNEST M. "RED" ANDREWS DURING THE PUNISHMENT PHASE OF THE TRIAL. (Amended Motion for New Trial, Nos. 95, 97 & 98).

Article 37.07 and 37.071, Code of Criminal Procedure, govern, and permit the introduction in evidence, respectively, of the Defendant's prior criminal record and "any matter that the Court deems relevent to sentence." As to prior criminal record, the term is specially defined in Section 3(a) of Article 37.07 to mean "a final conviction in a court of record." Defendant did not object to the admissability of the judgment and sentence that followed the indictment which is State's Exhibit 74, for they demonstrated the final conviction of this Defendant for the offense of murder without malice, but it is submitted that the term "conviction"

as used in Article 37.07 means simply what it says and excludes from consideration by the jury that with which the Defendant was charged, the universal rule being that an indictment is no evidence of guilt. To allow in evidence the indictment for murder with malice aforethought was to inform the jury and permit it to consider to some extent details of an offense charged, but of which the Defendant was not finally convicted. Notwithstanding this Court's opinion in Knox v. State, 487 S.W.2d 322, to the effect that the pleadings, including indictment, complaint and information are admissible in demonstrating an accused's "prior criminal record", it is submitted that such "holding" was dicta, wholly unnecessary to the determination made in that case.

The testimony of Ernest M. "Red" Andrews during the punishment phase respecting joking conversations concerning this Defendant's brother's body, the pooring of concrete over it, and comments respecting such deceased brother's wife, were likewise incompetent, beyond the purview of "prior criminal record", and were introduced solely to show details of such prior offense, and equally as prejudicial was Mr. Andrew's testimony concerning the trip made by this Defendant, Co-Defendant Sanne and Mr. Andrews to Houston, permitting the jury to infer and speculate upon something that never occurred (other than a drive to Houston) and to speculate on extraneous offenses as based upon Mr. Andrew's own interpretation and opinion of the comments made by

this Defendant or his Co-Defendant.

TWENTY-FIRST GROUND OF ERROR

THE TRIAL COURT ERRED, DURING THE PUNISHMENT PHASE OF THE TRIAL, IN ITS CHARGE IN SUBMITTING TO THE JURY SPECIAL ISSUE NO. 1 AND SPECIAL ISSUE NO. 3, AS DEFINED IN ARTICLE 37.071, CODE OF CRIMINAL PROCEDURE, BECAUSE IN THE CONTEXT OF THE PROSECUTION'S THEORY OF THE CASE THERE WAS NO EVIDENCE AND NO LEGALLY COMPETENT EVIDENCE TO SUPPORT THE SUBMISSION OF SUCH ISSUES. (Amended Motion for New Trial, Nos. 102, 103 & 105).

Special issue No. 1, as submitted in this case, and as obviously contemplated in its statutory formulation, must require conduct by and accused that "caused the death of the deceased" and its deliberate commission with the reasonable expectation that the death of the deceased or someone would follow. The entire theory upon which this case was tried, as clearly reflected by the charge of the Court on the guilt or innocence phase of the trial, took into account the admitted shooting of the decedent by Co-Defendant Sanne, as claimed in self-defense, and without any definition or explanatory instruction there was no competent evidence to submit to the jury concerning the deliberateness of this Defendant's conduct or any matter encompassed within Special Issue No. 1. Indeed, the submission of the statutory special issue, without more, in this case and upon the theory on which it was tried, would permit the jury to consider the conduct of Co-Defendant Sanne in determining whether or not there was conduct by this Defendant that caused the death or that it was committed deliberately and with the reasonable expectation of death. The same argument applies to the

submission of Special Issue No. 3, for the only evidence raising such issue was the testimony of Co-Defendant Sanne respecting his claim of having been struck in the face with a pistol by the decedent, and to submit such special issue with regards to this Defendant again prejudiced him because it permitted the jury to consider again the conduct of Co-Defendant Sanne, in the context of the entire charge on punishment. Rather than putting an additional burden on the State to prove yet another special issue, it simply permitted the State to argue, and the jury to consider, another's conduct when there was no evidence of any conduct by Defendant Skillern in response to any provocation by the deceased.

TWENTY-SECOND GROUND OF ERROR

THE TRIAL COURT ERRED IN SUBMITTING SPECIAL ISSUE NO. 2 DURING THE PUNISHMENT PHASE OF THIS TRIAL BECAUSE THERE WAS NO EVIDENCE AND NO LEGALLY COMPETENT EVIDENCE TO SUPPORT THE SUBMISSION OF SUCH ISSUE. (Amended Motion for New Trial, No. 103).

Defendant refers to his arguments hereinabove respecting the introduction of the indictment in his former trial in which he was convicted of the offense of murder without malice, the introduction and evidence of the testimony of Ernest M. "Red" Andrews, and to the testimony of Doctor Rupp as being totally incompetent, and further says that the Court's failure to define in plain and intelligible language the meaning of "probability" and "criminal acts of violence" was likewise error.

TWENTY-THIRD GROUND OF ERROR

THE TRIAL COURT ERRED ON NUMEROUS OCCASIONS, DURING VOIR DIRE EXAMINATION OF THE SPECIAL VENIRE,

DURING THE GUILT OR INNOCENCE STAGE OF THE TRIAL, AND DURING THE PUNISHMENT PHASE OF THE TRIAL, IN ASSUMING THE ROLE OF THE PROSECUTION, DENYING THIS DEFENDANT HIS RIGHT OF CROSS-EXAMINATION OF WITNESSES, ALL EFFECTIVELY DENYING THIS DEFENDANT THE ASSISTANCE OF COUNSEL AND THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED HIM BY THE SIXTH AMMENDMENT, UNITED STATES CONSTITUTION. (Amended Motion for New Trial, No. 107).

This Defendant specially invokes the mandate contained in Article 37.071 of the Code of Criminal Procedure to review by this Court of the judgment and sentence, and the sufficiency of any evidence to support it. By way of illustration, and not by way of limitation, Defendant refers to the testimony of Doctor Rupp during the punishment phase of this trial, and to the Court's interruption of cross-examination of such witness, and the effective denial thereof (S.F. 2835-2838) in which the Court in so many words told the jury that the conduct of this Defendant's counsel was improper in the manner of cross-examination of Doctor Rupp, without there having been advanced any objection by the State's attorney, the calling of Doctor Rupp for such opinion testimony having been a surprise in the first instance, followed by the Court having denied counsel time to prepare for cross-examination of such witness who concluded his testimony on direct examination at noon. U.S. v. Candelaria-Gonzalez, 547 F.2d 291 (5th Cir. 1977). The record will disclose other instances.

CONCLUSION

Defendant-Appellant, Doyle E. Skillern, respectfully submits that each and all of the foregoing errors reflect a denial of due process, violation of the specific provisions

of the Code of Criminal Procedure where cited, denied this Defendant the assistance of counsel and the effective assistance of counsel, and if not individually, then certainly in their cumulative effect. Knapp v. State, 311 F.2d 71.

Wherefore, premises considered, Appellant prays that this cause be reversed and remanded for a new trial.

Respectfully submitted,

By David B. Connery

David B. Connery, Jr.
2000 South Post Oak Rd.
1735 Post Oak Central
Houston, Texas 77056
(713)629-1580
Attorney for Appellant,
Doyle E. Skillern

CERTIFICATE OF SERVICE

I certify that on this 13th day of September, 1979, I mailed copies of the above and foregoing Brief by United States Postal Service, postage prepaid to Mr. Tom Bridges, District Attorney, San Patricio County Courthouse, Sinton, Texas 78387 and to Mr. Charles D. Butts, Special Prosecutor, 401 Jack White Way, San Antonio, Texas 78205.

By David B. Connery

David B. Connery, Jr.